In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 885

MARINE CARRIERS CORPORATION, PETITIONER

v.

HENRY H. FOWLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 37-45) is reported at 305 F. Supp. 984. The opinion of the court of appeals (Pet. App. 21-36) is reported at 429 F. 2d 702.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1970, and timely petitions for rehearing were denied on July 27, 1970 and August 13, 1970.

The petition for a writ of certiorari was filed on October 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a ship created in the United States by joining the stern section from a United States ship to the forebody of a foreign ship qualifies for coastwise trading when the forebody was originally constructed in the United States for a foreign corporation.

STATUTE INVOLVED

The relevant portion of Section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. 883, provides:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: *Provided*, That no vessel having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part, or placed under foreign registry,

shall hereafter acquire the right to engage in the coastwise trade * * *.

STATEMENT

Petitioner commenced this action to secure a declaratory judgment that its tanker, the OBSERVER, is entitled to enrollment in the coastwise trade, that is, between points within the United States. Petitioner also sought an injunction ordering respondents to enroll the OBSERVER (Pet. App. 37).

The OBSERVER was created in a United States shipyard by joining the forebody of a Liberian tanker, the SANTA HELENA, to the stern of an American tanker, the TRUSTCO (Pet. App. 23-24). The TRUSTCO had been built in the United States and enrolled in the coastwise trade (Pet. App. 24). The SANTA HELENA was herself a composite. Her forebody was originally part of the WAPELLO, which had been built in the United States for a Panamanian corporation (Pet. App. 38). Subsequently, the forebody of the WAPELLO was transferred to a Liberian corporation and joined in a Japanese shipyard to the stern section of the ESSO CHITTAGONG, a United States-built Panamanian tanker, to form the SANTA HELENA (Pet. App. 23, 38). The SANTA HELENA was then registered under the law of Liberia.

Thus, each of the two sections forming the OBSERVER had been built in the United States, but neither of the two previous ships containing the OBSERVER's forebody had been owned by a United States citizen, registered under United States law, or enrolled in the coastwise trade (Pet. App. 23-24, 35, 41).

The Commissioner of Customs denied petitioner's request for coastwise privileges for the OBSERVER (Pet. App. 46-48). The OBSERVER was then registered as a United States ship but banned from coastwise trading (Pet. App. 25). The Assistant Secretary of the Treasury upheld this prohibition (Pet. App. 49, 51). Petitioner then commenced this action in the United States District Court for the Southern District of New York. Both sides moved for summary judgment. In granting petitioner's motion, the court held that the OBSERVER is entitled to coastwise trading privileges and ordered respondents to approve documentation for such privileges (Pet. App. 37-45).

The court of appeals reversed. It held that the OBSERVER's eligibility for coastwise privileges depends on whether the ship should be characterized as a rebuilt TRUSTCO or a rebuilt SANTA HELENA (Pet. App. 35) and remanded for a trial on this issue. If the OBSERVER is found to be the TRUSTCO rebuilt, she will be eligible, the court of appeals ruled, because the TRUSTCO had been eligible and because the rebuilding had been performed within the United States (Pet. App. 35). If she is found to be the SANTA HELENA rebuilt, however, the OBSERVER must be excluded under the decision below because the SANTA HELENA was held excludable on alternative grounds (Pet. App. 33-34). Regarded as a rebuild of either the WAPELLO or the ESSO CHITTAGONG, the Liberian SANTA HELENA was found ineligible under the first proviso to 46 U.S.C. 883 because both prior

vessels had been built in the United States and sold to a foreigner (Pet. App. 33-34).[1] The court also found the SANTA HELENA excludable under the second proviso to 46 U.S.C. 883 because the rebuilding which produced her occurred in Japan (Pet. App. 34).

ARGUMENT

This case does not warrant review by this Court. No conflict in decisions exists on the narrow question of limited significance presented by petitioner. Moreover, the court of appeals correctly rejected petitioner's construction of the first proviso to 46 U.S.C. 883.

1. The criteria for enrollment in the coastwise trade are set forth in 46 U.S.C. 11, 13, 252, 808 and 883. Sections 11 and 252 enable vessels built in the United States and wholly owned by a United States citizen to be enrolled. A foreign-built vessel can qualify only if it was owned by United States citizens in 1920 (Section 13) or has been obtained from the Secretary of Commerce and thereafter continuously owned by United States citizens (Section 808). Once registered under foreign law or sold to a foreigner, a ship loses its eligibility forever (Section 883).

Petitioner concedes that the decision below is the only appellate holding on the issue presented in the thirty-five years since enactment of the first proviso to 46 U.S.C. 883 (Pet. 14). Indeed, the question of the OBSERVER's eligibility for coastwise trading arises

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[1] The ESSO CHITTAGONG forfeited its coastwise privileges even under petitioner's construction of the first proviso because she was constructed in the United States for a United States citizen, registered as a United States ship, then sold and registered foreign.

only because the ship (1) is owned by a United States citizen and (2) documented under United States law, and (3) was produced in the United States by the joining of (4) the stern of an American ship (5) to the forebody of a foreign vessel, but (6) that forebody had originally been built in the United States (7) for a foreign owner. A change in any of these seven factors would decisively alter the issue of the OBSERVER's eligibility. Since only the most peculiar and complex genealogy of the vessel involved here gives rise to this controversy, the decision below affects the coastwise privileges of an extremely restricted class of ships.

2. The court of appeals correctly resolved this narrow question of limited significance against petitioner. Contrary to petitioner's claim (Pet. 18), the language of the first proviso is not clear and unambiguous. The district court and the court of appeals reached opposite results in construing the following language: "having at any time acquired the lawful right to engage in the coastwise trade, either by virtue of having been built in, or documented under the laws of the United States, and later sold foreign in whole or in part * * *." The district court, emphasizing the first phrase, held that "previous acquisition of coastwise trading privileges is a *sine qua non* to the proviso's application" (Pet. App. 41). Of course, if this construction were correct, the OBSERVER would not be barred because the ship that contributed her forebody—the WAPELLO—would not come within the proviso. As the court of appeals noted, however, the second phrase of the proviso seems to indicate that

the proviso "applies to all vessels sold foreign after having been built in the United States" (Pet. App. 28), which would include the WAPELLO.

Faced with this "inartful wording" (Pet. App. 27), the court of appeals properly resolved the ambiguity by interpreting the first proviso to bar those vessels that provided the OBSERVER's forebody. First, under petitioner's reading of the first proviso (Pet. 15-16), a United States-built vessel would not be barred if it had been sold originally to a foreigner, but would be excluded if it had been built for an American and then sold to the foreigner. As the court of appeals stated (Pet. App. 28 n.3), there is no "reason in logic or policy why these two classes of ships should be treated differently."

Second, the statutory policy of the coastwise trading provisions, which the court of appeals recognized as "unabashedly protectionist" (Pet. App. 31), militates against enrolling the OBSERVER. "The principle aim of [the first proviso] was to encourage resort to American shipyards by preventing cheap purchase of ships which previously had been sold to a foreign buyer." *Pennsylvania R.R. Co.* v. *Dillon*, 335 F. 2d 292, 295 n. 5 (C.A.D.C.), certiorari denied, 379 U.S. 945. This aim would be frustrated if a ship containing the forebody of a Liberian tanker were granted coastwise privileges.[3]

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[3] Indeed, in its petition for rehearing in the court of appeals, the government argued that this clear statutory policy requires the OBSERVER to be held ineligible because a significant portion of the ship is ineligible, regardless of whether the resulting vessel is characterized as the TRUSTCO rebuilt or the SANTA HELENA rebuilt.

Third, the legislative history indicates Congress' intention that the first proviso exclude vessels precisely like the WAPELLO, which supplied the OBSERVER's forebody. Both committee reports recommending enactment of the proviso state that it:

> will prohibit the following classes of vessels from engaging in the coastwise trade:
>
> 1. Vessels built in or documented under the laws of the United States and later sold to foreign owners.
> 2. Vessels built in the United States for foreign countries or foreign purchasers. * * *

S. Rep. No. 870, 74th Cong., 1st Sess. 2; H. Rep. No. 118, 74th Cong., 1st Sess. 2. Since the WAPELLO is squarely within the second category, the committee reports simply "could not have been more specific" (Pet. App. 30).

Finally, in accordance with this legislative history, the administrative interpretation of the first proviso has long been that "no vessel that [such as the WAPELLO] is built in the United States and is placed under foreign registry shall thereafter acquire the right to engage in the coastwise trade." Testimony of Thomas E. Stakem, Administrator of the Federal Maritime Administration, Hearings on S. 1627 Before the Senate Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, 87th Cong., 1st Sess. 78.

The rejection of petitioner's construction of the first proviso by the court of appeals is, therefore, amply supported.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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